IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

—v.—

NEW YORK

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

INDEX

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 1A COUNTY OF NEW YORK

STATE OF NEW YORK,)
) SS.:
COUNTY OF N.Y.)

COMPLAINT—August 11, 1968

J. J. Crowley, of No. 625 8th Ave. NYC being duly sworn, says that on 8/10/68 at about 9 PM at Port Authority Bus Terminal, 625 8th Ave. County, City and State of New York, the defendant(s) Arthur Bethea and Robert Baldwin committed the offense(s) of:

_____ ATTEMPTED PETIT LARCENY (Sec. 110.00, 155.25 Penal Law), in that said defendant attempted to steal property;

_____ PETIT LARCENY (Sec. 155.25 Penal Law), in that said defendant did steal property;

_____ JOSTLING (Sec. 165.25 Penal Law), in that said defendant, in a public place, intentionally and unnecessarily placed his hand in the proximity of a person's pocket and handbag;

__X__ JOSTLING (Sec. 165.25 Penal Law), in that said defendant, in a public place, intentionally and unnecessarily jostled and crowded another person at a time when a third person's hand was in the proximity of such person's pocket and handbag;

_____ FRAUDULENT ACCOSTING (Sec. 165.30 Penal Law), in that said defendant did accost a person in a public place and, at that time and place and subsequently in any place, made statements to said person of a sort commonly made and used in the perpetration of a known type of confidence game;

_____ FORTUNE TELLING (Sec. 165.35 Penal Law), in that said defendant, for a fee or compensation, which he directly and indirectly solicited and received, claimed

and pretended to tell fortunes and held himself out as being able, by claimed and pretended use of occult powers, to answer questions and give advice on personal matters, and to exercise, influence and affect evil spirits and curses in that: Deponent states that he observed defendants acting in concert at the above stated time and place, in that they unnecessarily and intentionally did interfere with and jostle an unidentified female in that defendant Arthur Bethea did crowd said female and attempted to shield actions of defendant Robert Baldwin who did place his hand in the proximity of unknown female's purse.

/s/ Pet. J. J. Crowley
Affiant

Sworn to before me
8/11/68

/s/ Thomas E. Rohan
Judge

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 1A COUNTY OF NEW YORK

Docket Nos. B-16968-9

CHARGE: 165.20 P.L.

PEOPLE OF THE STATE OF NEW YORK
on complaint of J. J. CROWLEY

vs.

ARTHUR BETHEA, ROBERT BALDWIN

New York, N. Y.

MINUTES OF AUGUST 11, 1968

ARRAIGNMENT

BEFORE: HON. THOMAS E. ROHAN, Presiding Judge.

APPEARANCES:

FOR THE PEOPLE:

DAVID FULLER, ESQ., Assistant District Attorney.

FOR THE DEFENDANTS:

ROBERT FERRARO, ESQ., Legal Aid Society.

COURT OFFICER:

HERMAN SHERMAN

JACK L. BERMAN
Official Court Reporter

[fol. 2] COURT OFFICER: Docket Numbers B-16968 and B-16969, Arthur Bethea and Robert Baldwin, charged with 165.20 of the penal law on the complaint of J. J. Crowley. Raise your right hand please. Do you swear to the truth of the contents of this affidavit?

THE COMPLAINANT: I do.

COURT OFFICER: Counsel, do you waive the public reading of the charges and rights?

DEFENDANT'S COUNSEL: Yes, I do. Your Honor, may I refer this to 2-A? What date?

ASSISTANT DISTRICT ATTORNEY: The 26th is suggested.

DEFENDANT'S COUNSEL: August 26th.

THE COURT: The plea is not guilty?

DEFENDANT'S COUNSEL: Yes, sir.

THE COURT: A thousand dollars each.

COURT OFFICER: You may communicate free of charge from the Office of the Warden.

[Reporter's Certificate to foregoing paper omitted in printing.]

IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
COUNTY OF NEW YORK PART 2A

Docket Nos. B16968
B16969

CHARGE: 165.25 P.L.

[Title Omitted]

100 Centre Street
New York, N. Y.

MINUTES OF AUGUST 26, 1968

BEFORE: HON. AMOS S. BASEL, Justice.

APPEARANCES:

FRANK HOGAN, District Attorney, For the People. 155 Leonard Street, New York, N. Y. 10013

By: LAWRENCE DUBIN, A.D.A.

ANTHONY F. MARRA, ESQ., For the Defendants. 100 Centre Street, New York, N. Y. 10013

By: J. JEFFREY WEISENFELD, ESQ.
And: JEFFREY ALLEN, ESQ., of Counsel.

[fol. 2] PROCEEDINGS

THE BRIDGEMAN: Number 13, Arthur Bethea, Robert Baldwin. This is on the prison calendar.

Detective John Pagano.

MR. WEISENFELD: Your Honor, on this case Defendant has another case which we are attempting to either put on this calendar or have this case adjourned to the same day as the other case.

I'd ask for a second call.

THE COURT: There are two Defendants here.

MR. WEISENFELD: Just as to the Defendant Bethea.

THE COURT: Second call.

* * * *

THE BRIDGEMAN: Number 13 on the prison calendar, Arthur Bethea, Robert Baldwin.

Detective Joseph Pagano.

MR. DUBIN: Ed, are there two cases regarding these Defendants on today's calendar?

THE BRIDGEMAN: So far as I know I don't have any other paper on this.

MR. ALLEN: Your Honor, could we have another call.

THE BRIDGEMAN: Third call.

* * * *

[fol. 3] THE BRIDGEMAN: Number 13, prison calendar, Arthur Bethea, Robert Baldwin.

Detective Pagano.

THE COURT: Yes, sir, you ready on this case?

THE BRIDGEMAN: Gentlemen, what's your pleasure?

MR. DUBIN: Your Honor, the People would be ready to proceed today. However, due to the calendar congestion this morning and the fact that we've already marked a number of cases ready I don't believe that we'll reach this case in the course of today's proceedings, and, therefore, I'd like to let the officer go so he can resume his duties.

Can we have an early adjourned date.

THE COURT: They're in, the police officer is here. It's 2:30. Maybe we can reach it.

MR. ALLEN: Defendants are ready.

THE COURT: I don't think we'll reach it, but we could, it's possible.

* * * *

THE BRIDGEMAN: Recall number 13, Arthur Bethea, Robert Baldwin, on the prison calendar.

Have you got a date, officer?

MR. DUBIN: The People are ready.

[fol. 4] THE BRIDGEMAN: This is an adjournment.

For the record, it's Patrolman Crowley.

Legal Aid.

THE COURT: What date do you want?

(Whereupon, both counsel approached the bench.)

THE BRIDGEMAN: Number 65 on the calendar, Arthur Bethea is here also on a bench warrant which was issued on March 19, 1968 by Judge Solniker. The Defendant failed to appear at 12:10. The parole was revoked and the warrant ordered.

That's as to Bethea, your Honor, Defendant number one on 13.

THE COURT: What about that warrant? Put that over. I'll fix bail.

Counsel, what do you want to do on this warrant against Bethea?

MR. ALLEN: Your Honor, on the face I'd ask the Court to dismiss because on the face of the Complaint it seems, if I may make a motion on a motion to suppress, it seems that the evidence would have to be suppressed.

MR. DUBIN: Your Honor, the People are ready to proceed to trial on this case. I believe the defense attorney is alsy ready.

[fol. 5] THE COURT: Let's adjourn the other cases.

* * * *

THE BRIDGEMAN: This is number 13 on today's calendar, Docket No. B16968 and 16969.

Defendant Arthur Bethea, Defendant Robert Baldwin are charged with violation of Section 165.25 of the Penal Law, and this is on the complaint of officer Crowley of the Port Authority.

Both sides are ready?

MR. DUBIN: Yes, People are ready.

MR. ALLEN: Yes.

Your Honor, at this time the Defendants make a motion for a jury trial.

THE COURT: Motion is denied.

PATROLMAN JOSEPH CROWLEY, Shield No. 1168, Port Authority Police, called as a witness by and on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DUBIN:

Q Officer Crowley, were you on duty on August 10, 1968, at about 9:00 P.M.?

A Yes, sir, I was.

[fol. 6] Q Pursuant to your duties did you have occasion to be at the Port Authority Bus Terminal located at 625 Eighth Avenue?

A Yes, I was.

Q While there, officer, at that location did you make certain observations of the Defendants Robert Baldwin and Arthur Bethea?

A I did.

Q Will you tell us what, if anything, you saw and what you did.

A At the aforementioned time and place subject Bethea placed and positioned his body—

MR. ALLEN: At this time, your Honor, I ask the officer not to read from his piece of paper that he has.

THE COURT: Yes.

Officer, if you need to refresh your recollection indicate that. Look at the sheet, try to refresh your recollection. If not we will put the sheet in evidence.

THE WITNESS: That's all right, your Honor, I'll put the sheet away.

Q Officer, tell us what you saw and what, if anything, you did.

A On the above time and date, which was August [fol. 7] the 8th at 9:00 P.M., I observed the two Defendants, Bethea and Baldwin, descend down the escalator stairway. At this time subject Bethea positioned himself directly alongside an unidentified female, and Defendant Baldwin at this time positioned himself to the rear and slightly to the left of this unidentified female.

At that time, as they continued down the stairway, subject Bethea turned his body slightly to the left, and at that instant Baldwin then proceeded to bring his right hand about and stick it into this woman's—open her clasp and stick his hand in her purse removing an unknown sum of money.

Q What happened at that point, officer, if anything?

THE COURT: Where were you at this point?

THE WITNESS: I was observing them from the above balcony area on the mezzanine.

Q Officer, what happened after you saw the Defendant Baldwin take the money out of the unknown female's pocket?

A At that time my partner, Detective John Pagano, and I proceeded ourselves to descend down the escalator so we could catch up to the two defendants.

Q And did you, in fact, catch the Defendants?

A Yes, we did.

Q Did you place them under arrest at that point, officer?

A Yes, we did.

[fol. 8] Q Officer, let me ask you this: When the Defendants positioned themselves on the escalator in close proximity to the unknown female, approximately how far were they from the unknown female?

A Well, the Defendant Bethea was right abreast of the unknown female.

Q Did there come a time during the course of the ride down the escalator when the Defendant Bethea actually touched the unknown female?

A Yes, there was.

Q And the Defendant Baldwin was to the rear of the female; is that correct?

A To the rear and a little to the left.

Q Officer, what was the condition of the escalator with regard to the pedestrian traffic on it at that point?

A It was very heavy at that time.

THE COURT: Let me ask you this: You say you saw him take money out of the purse?

THE WITNESS: That's right, your Honor.

THE COURT: What form was the money in, loose, a wallet, how?

THE WITNESS: The money appeared to me to come out in a loose package.

[fol. 9] THE COURT: Did you search the Defendants are you arrested them?

THE WITNESS: Yes, we did, your Honor.
THE COURT: Did you find money?
THE WITNESS: There was money, your Honor.
THE COURT: How much?
THE WITNESS: Your Honor, I don't recall the amount.
THE COURT: Which Defendant had the money?
THE WITNESS: Defendant Baldwin had money.
THE COURT: In what form was the money?
THE WITNESS: Your Honor, I would have to refer back to the Court papers.
THE COURT: Take a look at your notes. If that refreshes your recollection, testify.
THE WITNESS: I don't believe I have it on my notes, on the Court record.
THE COURT: Take a look at the Complaint and see if that refreshes your recollection.
THE WITNESS: Thank you.

(Examining documents)

Thank you.
THE COURT: Can you answer the question?
[fol. 10] THE WITNESS: Yes, the amount that Defendant Baldwin had was $10 bill.
THE COURT: All right.
Anything more, Mr. D.A.?
MR. DUBIN: No, I have nothing further, judge.
You may inquire.

CROSS-EXAMINATION

BY MR. ALLEN:

Q Patrolman Crowley—
A Yes, sir.
Q —have you ever seen these Defendants before?
A No, I haven't, sir.
Q Have you ever seen wanted posters of them in the Port Authority?
A No.
Q You have absolutely no rememberance of seeing or hearing their names before this incident?

A Other than the night of the arrest.

Q When you say you were stationed on the balcony, what—how far were you from the Defendants?

A Well, if I may illustrate, it is similar to the set up that his Honor is sitting in now and the escalators to run down and up in this section here, whereupon, if [fol. 11] the Court would permit, I would get up and lean over the balcony area this way and observe the descending and ascending movement.

THE COURT: The witness indicates that he is leaning on his elbows looking over a parapet.

Q How far would you say you were from the Defendants when you allegedly observed this?

A Approximately ten feet.

Q How far down the escalator would you say they were?

A During that time of movement or course of movement—about the 15th step down.

Q Would you say that's halfway down?

A Less than half.

Q Were there people behind the Defendants?

A That's correct.

Q At what height would you say—at what position would you say the Defendant's hand was in when he allegedly took the money?

A Which Defendant are you referring to?

Q Defendant Baldwin.

A What position was his hand when what, sir?

Q When you saw him take the money.

A His hand, it was his right hand movement.

Q In what—in relation to his body what position was [fol. 12] it in?

A I don't understand the question.

Q In other words, how—would you say it was chest high?

A No, sir.

Q Would you say it was waist high?

A It was about belt high.

Q And you were standing above the escalator; is that correct?

A That's correct, sir.

Q The Defendants were about 15 steps below you?
A That's correct.
Q And there were people behind the Defendants?
A Yes, there were.
Q And you saw the Defendant's hand waist high?
A I did, sir.
Q Well, did you have a clear view of the Defendant's hand?
A I certainly did.
Q Did you see over the people behind the Defendants?
A No, sir.
Q Would you explain to the Court what was in your line of vision from yourself to the Defendant.
A Yes, both the Defendants were in clear line with me.
Q But you just stated there were people standing [fol. 13] right behind the Defendant?
A That's correct, the escalator goes down this way, sir.
THE COURT: Indicating a 45 degree angle.
Q What position—you were standing perpendicular to the Defendants?
A I was in a direct line with them, yes.
Q Was the Defendant's hand in the pocket?
A I saw Defendant Baldwin reach into the pocketbook.
THE COURT: Let me ask you this: The balcony on which you were standing, what kind of angle is it to the escalator?
THE WITNESS: Your Honor, it's just as square as this would be and the escalator running down the middle on a 45.
THE COURT: Runs down the center of—
THE WITNESS: That's correct, your Honor, it would head down inwards here.
THE COURT: In other words, the balcony you see over the heads of everybody then?
THE WITNESS: Your Honor, I could see in line with them on the side vision.
Q Officer, what hand was the Defendant reaching into the unknown female's—

[fol. 14] A Right hand.

Q Was the unknown female standing on the right of the Defendant?

A The unidentified female was standing to the right of the Defendant Bethea, and she was in front and slightly to the right of the Defendant Baldwin.

Q Was the railing—how high was the railing of the escalator?

A Less than—it's about four foot.

Q And how tall is the Defendant?

A Which Defendant?

Q Excuse me, the unknown female.

A The unknown female?

Q Yes.

A I'd say she was about five foot six, five foot seven.

Q So, would you say—and where did the money allegedly come from?

A From her pocketbook.

Q Her pocketbook?

A Yes, sir.

Q Was her pocketbook hanging by her side?

A She had her pocketbook strapped on her arm about her chest high.

[fol. 15] Q Was the—did the Defendant Baldwin's hand, did it—how far into the pocketbook was it?

A I'd say about wrist, wrist deep.

Q Did you see the Defendant Bethea touch the female?

A It was a body contact.

Q In your opinion would you say it was an intentional body contact?

A Yes, I would, sir.

Q Would you say there were many people on the escalator?

A I stated so before, yes.

Q Did you see other people touching each other?

A I saw other people descending the escalator together.

Q In other words, would you say that everyone on the escalator was in contact with each other?

A No, sir.

Q Would you say a good majority of the people were touching each other?

A At that point I couldn't say, I was observing the two Defendants.

Q You stated to the Court that you originally—initially what did you see the Defendant take out of the pocketbook?

A A sum of money, sir.

Q And what description did you use to describe that [fol. 16] money, do you remember?

A No, but—

Q Did you say a loose package?

A I believe I said a loose package.

Q And what did you discover upon arresting the Defendants and searching them? What did you find?

A I found loose money on them, sir.

Q One $10 bill?

A There was a $10 bill.

Q Was there anything else?

A I don't recall.

Q Did you find anything on the Defendant Bethea?

A I don't remember, sir.

MR. ALLEN: No further questions.

REDIRECT EXAMINATION

BY MR. DUBIN:

Q Officer, the Defendant Baldwin was on the step immediately behind the unknown female and the Defendant Bethea; is that correct?

A That's correct.

Q Was there anyone else on the step with the Defendant Baldwin?

A No, sir, because he positioned himself in the middle [fol. 17] of the step slightly to the left of the—

Q Was there anyone on the step immediately behind the Defendant Baldwin?

A Yes, there was.

Q Was there anyone on the step immediately in front of the unknown female and the Defendant Bethea?

A Yes, there was, sir.

Q Officer, approximately how far above the Defendants were you when you made your observations?

A Heightwise?

Q Yes.

A It was five feet distance away, approximately ten feet.

Q Officer, am I correct in assuming that when you made your observations Defendants passed right alongside of where you were standing?

A That's true.

Q At that point approximately how far would they be from you?

A About five feet, sir.

Q And at what point on this ride down the escalator did the actual incident you described, the Defendant Baldwin's hand going into the pocketbook and removing the money take place?

A I'd say ten feet out and two feet to the left of me.

[fol. 18] Q And your position on the balcony with regard to the Defendants, was that looking over the escalator as it was going down on a 45 degree angle?

A That's correct.

MR. ALLEN: Your Honor, I object, I believe this has been gone into already.

THE COURT: I'll overrule the objection.

Q Officer, were you looking ahead of the Defendants as they were going down the escalator or at a sideview?

A It could be stated a slight angle, sir.

MR. DUBIN: All right, I have nothing further.

MR. ALLEN: No further questions.

THE BRIDGEMAN: People's case?

MR. DUBIN: That's the People's case.

(Witness excused)

THE BRIDGEMAN: Please rise.

MR. ALLEN: At the end of the People's case, your Honor, I move to dismiss on the grounds that People failed to establish a prima facie case as to each Defendant.

THE COURT: Motion is denied.

MR. ALLEN: Defendants will call no witnesses, your Honor. Defense rests.

[fol. 19] THE COURT: Make your motion.

MR. DUBIN: People rest.

THE COURT: Make your motion on the whole case.

MR. ALLEN: Your Honor, defense rests.

At the close of the entire case I'd ask to acquit as to Defendant Bethea. All that was shown was that he was standing behind the female. The officer stated he found money on both of them originally and on cross-examination he said he found money only on the Defendant Baldwin.

I believe the Defendants have—are known in that area, and I'd ask the Court to take all that into consideration and acquit them as to these charges.

THE COURT: Anything you want to say, Mr. Dubin?

MR. DUBIN: Yes, your Honor.

Just briefly I'd like to read the wording of the section with which the Defendants are charged, 165.25 of the Penal Law, they're charged with jostling, in that said Defendant in a public place intentionally and unnecessarily crowded another person at a time when a third person's hand was in the proximity of such person's pocket or handbag.

Your Honor, I believe the testimony elicited from the [fol. 20] police officer on direct examination revealed that that is what took place at the Port Authority Bus Terminal. The Defendant Bethea crowded against her and the Defendant Baldwin reached from behind and went into her pocketbook.

I believe that the People have sustained their burden and that the Defendants should be found guilty.

THE COURT: In my opinion the police officer was a very forthright and credible witness, and I find both Defendants guilty after trial.

Record and sentence for when?

DEFENDANT BALDWIN: Your Honor, I'd like to say that I admit—

MR. ALLEN: What do you want to say?

(Whereupon, the Defendant Baldwin and Mr. Allen had a discussion.)

THE COURT: Record and sentence.
We don't need the police officer.
9/3, record and sentence.
Both Defendants are remanded.
THE DEFENDANT: Before we do that, your Honor, disposition on 65, there is a bench warrant outstanding against Arthur Bethea.
[fol. 21] THE COURT: Do you want to do anything with this, Mr. D.A.?

(Whereupon, Mr. Dubin and Mr. Allen approached the bench.)

MR. DUBIN: Your Honor, in light of the decision with regard to the case just tried the People would at this time move to dismiss the charge pending against the Defendant on Calendar Number 65 of today's calendar, Docket B3767, and that is to the Defendant Arthur Bethea, that being criminal possession of a dangerous drug in the 4th degree, possession of one alleged marijuana cigarette.
THE COURT: Put them in.

* * * *

I hereby certify that this is a true and correct transcript of the proceedings in the above-entitled matter.

/s/ George Aaronson
GEORGE AARONSON

[Reporter's Certificate to foregoing paper omitted in printing.]

[fol. 1] IN THE CRIMINAL COURT
OF THE CITY OF NEW YORK
PART 3 : COUNTY OF NEW YORK

Docket Nos. B16968
B16969

[Title Omitted]

Charge: 165.25 of the Penal Law

MINUTES OF SEPTEMBER 3, 1968

100 Centre Street
New York, N. Y.

BEFORE: AMOS S. BASEL, Judge

APPEARANCES:

FOR THE PEOPLE

JEFFREY C. HOFFMAN, ESQ., Assistant District Attorney

FOR THE DEFENDANT

LEGAL AID SOCIETY

By: JAMES BERNARD, ESQ.

COURT OFFICER

MELVIN SCHNITZER

THOMAS J. LANDERS, C.S.R.
Official Court Reporter

[fol. 2] COURT OFFICER: Added cases to the Calendar, Docket B16968 and 16969, Arthur Bethea and Robert Baldwin.

MR. BERNARD: Your Honor, each defendant is ready for sentence.

THE COURT: Do you know of any legal cause why sentence should not now be imposed?

MR. BERNARD: If it please the Court, I'd like to be heard in mitigation of sentence.

THE COURT: Yes.

MR. BERNARD: Addressing myself first to the defendant, Bethea, in mitigation of sentence I would state to the Court this defendant is 23 years of age. He has some history of contact with the courts. However, I point out to Your Honor that he has never been convicted of a felony. His involvements have been—well, not to be minimized—at the time of his arrest he was a duly enrolled and pursuing student in the Manpower Program where he was learning merchandising. And he lives alone. He has no wife or children; no one suffers because of his illegal activities except himself.

The codefendant is 26 years of age. He has some also [fol. 3] extensive history of prior contact with the courts. However, he also has never been convicted of a felony nor has he been involved in anything of a really serious nature. At the time of his arrest he was employed on a full-time basis at Dill's Hat Cleaning Company and had been so employed for a continous period of six years. It shows something. He has some continuity to some of the arrests of his life. He also lives alone.

I ask that the Court be as lenient as possible in imposing sentence. I'm pointing out also to the Court—Your Honor presided at the trial.

THE COURT: Yes. That's why it's sent here.

MR. BERNARD: Your Honor knows all the particulars; the charges are not serious although not to minimize it.

SENTENCE

THE COURT: This is a jostling case which took place in the Port Authority Bus Terminal. There were a lot of people there and these defendants were going down an escalator and the police officer observed them on the balcony above the escalator and arrested both of them.

Record discloses that the defendant here under the name of Robert Baldwin was first arrested under the name of Robert Stewart in Newark, New Jersey, for [fol. 4] auto theft by the FBI in 1960 for which he received one year probation.

He was then arrested in 1960, again, one year probation. Then there are a series of arrests in New Jersey which culminated in receiving a year sentence for stolen automobile in 1962.

In 1963, unlawful use of an automobile, one year, again. In 1964, still in New Jersey, assault and burglary, four months. In 1964, larceny, four months. In 1965, burglary, six months. In 1966, there's an arrest without a disposition.

He then appears to have shifted his activity to Manhattan and in 1963 he was arrested here for jostling and no disposition of that. And '68 he was arrested here for burglary and no disposition on that and then he was arrested for jostling and he was convicted by me after trial.

The other defendant, Bethea, appears to be a native. He was first arrested in Queens in 1962, and the case was dismissed in the Adolescent Court. He was then given Youthful Offender treatment on another arrest in '62.

In '64 he was arrested for assault and robbery and the case was dismissed. In '65 he was arrested for grand [fol. 5] larceny in Brooklyn, no disposition. '65 grand larceny, again, in Brooklyn, for which he received 60 days.

In '65, grand larceny, pocketbook snatch. Now, in Manhattan, he got one year in the penitentiary. In '67, jostling, there's no disposition. In '68, January, jostling and it doesn't appear to be any disposition on that. And then February '68, there's a drug arrest which is undisposed of; and then this jostling. BCI sheet also shows that bench warrant is issued for him in the drug case.

I think under those circumstances, both of these defendants have had many encounters with the law and they have had an opportunity to try to change their way of life and it hasn't been any use, so under the circum-

stances I think that now I have to be worried about the people who frequent the bus terminal and other places in this City and protect them from the merchansing which he is studying, so it's the sentence of this Court that each defendant be sentenced to one year in the penitentiary. New York City Reception and Classification Center.

[Reporter's Certificate to foregoing paper omitted in printing.]

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York.

January 10, 1969

Present:—HON. SAMUEL H. HOFSTADTER, *J.P.*
" " JACOB MARKOWITZ (taking no part)
" " PETER A. QUINN, *Justices*

January No. 621

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

vs.

ROBERT BALDWIN, a/k/a ROBERT STEWART,
DEFENDANT-APPELLANT

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hon. Amos S. Basel, on the 26th day of August 1968, upon the charge of violation of Section 165.25 of the Penal Law, and having been sentenced by Hon. Amos S. Basel on the 3rd day of September, 1968, as follows:

1 year imprisonment

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

Enter

/s/ S. H. H.
Justice Appellate Term
Supreme Court, First Department

[Clerk's Certificates to foregoing paper omitted in printing]

No. 24

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of March in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD
Chief Judge, Presiding
RAYMOND J. CANNON
Clerk

REMITTITUR—March 6, 1969

App. T. 1. No. 24. 69

THE PEOPLE &C., RESPONDENT

vs.

ROBERT BALDWIN, APPELLANT

BE IT REMEMBERED, That on the 22nd day of January in the year of our Lord one thousand nine hundred and sixty-nine, Robert Baldwin, the appellant—in this cause, came here unto the Court of Appeals by Milton Adler, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Messrs. Nathan Z. Dershowitz

and Leon B. Polsky, of counsel for the appellant—, and by Mr. Michael R. Juviler, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 6, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk

[SEAL]

[Triple Certificate to foregoing paper omitted in printing.]

In the Matter of FRANK S. HOGAN, as District Attorney of the County of New York, Appellant, and LOUIS J. LEFKOWITZ, ATTORNEY-GENERAL OF THE STATE OF NEW YORK, Intervenor-Appellant, *v.* JACK ROSENBERG et al., and MARVIN PURYEAR, Respondent.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ROBERT BALDWIN, APPELLANT

OPINION—Decided March 6, 1969

* * * *

SCILEPPI, J. The issue presented for our consideration in the first of two cases to be discussed is whether a defendant facing possible imprisonment of not more than one year is entitled to a trial by jury.

On August 10, 1968 the appellant, Robert Baldwin, then 26 years old, was arrested for jostling, a class A misdemeanor carrying a maximum term of imprisonment of one year (Penal Law, §§ 165.25, 70.15, subd. 1). The appellant's pretrial motion for a jury trial was denied. The trial, conducted without a jury pursuant to section 40 of the New York City Criminal Court Act, resulted in a conviction and the appellant was sentenced to the maximum one-year term. The judgment of conviction was affirmed by the Appellate Term, First Department, and the appellant has appealed pursuant to permission of the Chief Judge of this court.

The appellant argues that the United States Supreme Court's recent decision in *Duncan* v. *Louisiana* (391 U. S. 145) is dispositive of the issue presented herein. We do not agree.

Duncan held that the right to a trial by jury guaranteed by the Sixth Amendment is incorporated in the Fourteenth Amendment's mandate of due process. The court hastened to note, however, that the constitutional right to a trial by jury applies only to "serious" crimes, and not to the so-called "petty" offenses. The court then embarked upon a definitional journey to determine wheth-

er Louisiana's simple battery statute with a maximum term of two years was of such a serious nature that the deprivation of a jury trial for such an offense was violative of the now incorporated Sixth Amendment guarantee.

In holding that punishment by imprisonment for two years *ipso facto* renders a crime serious, Justice WHITE, writing for the majority, stated:

"So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

"In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans* [300 U. S. 617], to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty

offenses are defined as those punishable by no more than six months in prison and a $500 fine. In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail. Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule. *We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.*" (*Duncan* v. *Louisiana, supra,* pp. 160-162; emphasis added.)

It is evident from the majority opinion that *Duncan* cannot reasonably be interpreted as being dispositive of the present case, but rather should be read for the proposition that statutes which make crimes punishable by imprisonment for terms of two years or more are to be viewed as serious, notwithstanding how the people of a particular jurisdiction might characterize the crime. The obvious rationale functioning is that necessarily coupled with the incorporation of the Sixth Amendment's guarantee of a right to a trial by jury is the imposition of Federal standards. *Duncan,* however, fails to draw the exact line of demarcation where the maximum punishment to be imposed is less than two years, but rather states that "the definitional task necessarily falls on the courts" to characterize the various crimes. In the absence of any further indication from the Supreme Court as to what the Federal standards are, it is our opinion, after performing that definitional task, that the people of our State have historically drawn the proper distinction between petty and serious crimes so as to satisfy the constitutional mandate of the Sixth Amendment.

At common law, misdemeanors, crimes punishable by imprisonment for no more than one year, were not indictable offenses and as such were not afforded jury trials, but rather were tried by the Magistrate alone.

When the phrase "trial by jury" was placed in the Sixth Amendment, it carried with it "the meaning affixed to [it] in the law as it was in this country and in England at the time of the adoption of [the United States Constitution]" (*Thompson* v. *Utah*, 170 U. S. 343, 350). At that time several offenses characterized as "petty" were tried without juries and, in many instances, the maximum term of imprisonment was one year (*District of Columbia* v. *Clawans*, 300 U. S. 617, 624-626). The reasoning underlying these summary trials was as the Supreme Court stated in *Duncan*: "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications" (*supra*, p. 160).

Recognizing the distinction between "petty" and "serious" offenses, the framers of the New York State Constitution provided that "Trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate" (N. Y. Const. [1777], art. XLI; see N. Y. Const. [1938], art. I, § 2).

The majority in *Duncan* stated that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937). The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,' 300 U. S., at 628, of the crime in question" (*Duncan* v. *Louisiana*, *supra*, pp. 159-160). It is our opinion that the maximum penalty authorized in the State of New York for a particular crime is not merely a gauge of how the people of our State view that crime, but necessarily answers the question of whether in their judgment it is petty or serious.

In *People* v. *Bellinger* (269 N. Y. 265) the defendant was charged with violating section 359-e (subd. 3) of the General Business Law in that, being a dealer in securities, he failed to file a supplemental dealer's state-

ment. At that time section 359-g provided that the penalties to be imposed for such an act should be "a fine of not more than five thousand dollars, or imprisonment for not more than two years or both".[1] The defendant argued that, although the charge in the information was designated a misdemeanor, in reality it was a felony and necessarily requires prosecution by an indictment and a trial by a jury. In reversing the judgment, this court stated that:

"The meaning of the words 'infamous crime,' which requires indictment by a grand jury and trial by a petty jury of twelve men, has been fairly well understood, during the years of our statehood, as evidenced by the distinction between felonies and misdemeanors outlined by legislative enactment.

* * * *

"The constitutional provision giving a party this right to a trial by jury does not apply to petty offenses tried before a Court of Special Sessions. (*People ex rel. Murray* v. *Justices*, 74 N. Y. 406; *People ex rel. Comaford* v. *Dutcher*, 83 N. Y. 240.) Petty offenses, however, have a well-defined meaning, classified as such by the penalties attached to them. *They cease to be petty when the imprisonment is * * * for a longer term than one year*" (*People* v. *Bellinger*, *supra*, pp. 270-271; emphasis added).

To further evidence that the misdemeanor-felony dichotomy in New York is the same as the petty vs. serious distinction, we need only look at the consequences which necessarily flow from a conviction of a misdemeanor as opposed to a felony.

While it is true that a misdemeanant suffers certain collateral consequences as a result of a conviction, the consequences are not of such a nature so as to render these crimes serious. On the other hand, however, an individual convicted of any felony suffers the very serious

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[1] Pursuant to the *Bellinger* decision, the Legislature amended section 359-g to provide for punishment "by a fine of not more than five hundred dollars, or imprisonment for not more than one year or both" (L. 1936, ch. 90).

collateral consequences of losing the right to register for or vote at any election (Election Law, § 152), forfeiture of all public offices and suspension of all civil rights (Civil Rights Law, § 79).

We thus conclude that those crimes which are denominated misdemeanors in this State are not crimes to be characterized as serious and, therefore, individuals charged with such crimes need not be afforded the Sixth Amendment's guarantee of a right to a trial by jury.

Having determined that as to appellant Baldwin section 40 of the New York City Criminal Court Act is not rendered unconstitutional by the incorporation of the Sixth Amendment's guarantee of a right to a trial by jury, we must necessarily reach the appellant's second argument that section 40 is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.[2]

The appellant contends that defendants charged with misdemeanors in New York City are presently being tried without juries pursuant to section 40, whereas defendants charged with the identical misdemeanors elsewhere in the State do receive the right to a jury trial (UDCA, § 2011; UCCA, § 2011); that such a classification is unreasonable and necessarily violates the equal protection clause of the Fourteenth Amendment. We do not agree.

The Supreme Court has recognized that territorial discrimination as between different states and even as between different parts of the same State is not of itself violative of the equal protection clause, even if the State has no reasonable basis for making such a distinction.

In *Salsburg* v. *Maryland* (346 U. S. 545) the Supreme Court held that the equal protection clause was not violated by a Maryland statute which made evidence obtained by illegal search or seizure generally inadmissible in prosecutions for misdemeanors, but permitted such

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[2] Appellant does not argue that section 40 violates the equal protection clause under the New York State Constitution (art. I, § 11) because the State Constitution specifically authorizes the Legislature to provide for jury trials in whatever court of the State it chooses (art. VI, § 18).

evidence in prosecutions for certain gambling misdemeanors in one specific county. The court stated: "The Equal Protection Clause relates to equality between persons as such rather than between areas" (*supra*, p. 551). And, therefore: "Whatever may be our view as to the desirability of the classifications, we conclude that the 1951 amendment is within the liberal legislative license allowed a state in prescribing rules of practice" (*supra*, pp. 549-550). The court continued quoting from an opinion in an earlier case which is dispositive of the appellant's present claim of denial of equal protection:

" '[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. *This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws.* * * * *It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances*' " (emphasis added).

"The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." (*Missouri* v. *Lewis*, 101 U. S. 22, 31 [1879], quoted at 346 U.S., p. 551, n. 6). (See, also, *Barbier* v. *Connolly*, 113 U. S. 27.)

Even assuming, *arguendo*, the correctness of appellant's underlying premise that territorial discriminations cannot be sustained unless based on a reasonable classification, we would nevertheless reach the same result because it is our opinion that the overburdening caseload existing in the criminal courts of the highly populated City of New York has given rise to extraordinary and unique circumstances which manifests the reasonable basis for making such a distinction.

As the Supreme Court stated in *Missouri* v. *Lewis* (101 U. S. 22, 32, *supra*): "Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions, — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321,368 nontraffic misdemeanor cases; whereas in the next largest city, Buffalo, the City Court disposed of 8,189 nontraffic misdemeanor cases. Although it is true that the population of New York City is approximately 15 times as large as Buffalo's, the figures still reflect an enormous disproportion, since New York City's caseload is more than 39 times as great. Moreover, only 78 Judges [3] were available in the New York City Criminal Court to hear those 321,368 misdemeanors whereas in Buffalo there were 12 Judges available to hear the 8,189 misdemeanors, a ratio of 6½ to 1, as compared to the caseload ratio of 39 to 1.[4]

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[3] Twenty additional Judges have been assigned to the Criminal Court of the City of New York (L. 1968, ch. 987). This, however, should not be viewed as a cure-all; for lack of courtroom space and necessary facilities for these new Judges and the mounting volume of cases continue to cause substantial delays and adversely affect the efficient administration of justice in the Criminal Court of the City of New York.

[4] Statistics supplied by the Office of the State Administrator of the Judicial Conference of the State of New York.

While this alone would suffice as a reasonable basis for not providing for the more time-consuming trial by jury of misdemeanors in the Criminal Court of the City of New York, one need only look to the already existing chaotic calendar conditions and delays in those courts and other courts of the City of New York, due to the constant increase in volume of cases, to find further justification for the territorial discrimination.

Accordingly, the judgment appealed from should be affirmed.

In *Matter of Hogan* v. *Rosenberg*, the companion case to *People* v. *Baldwin*, the precise question raised in *Baldwin* is raised again. The cases, however, are factually distinguishable in that the defendant in this case is between the ages of 16 and 21 and, therefore, notwithstanding his being charged with a misdemeanor, would be subject to young adult treatment pursuant to article 75 of the Penal Law and as such might receive the maximum four-year reformatory sentence.

On April 10, 1968 the defendant, Marvin Puryear, was arrested and charged with possession of burglar's tools, a class A misdemeanor (Penal Law, § 140.35) and criminal trespass in the third degree (Penal Law, § 140.05) a violation.[5] After a preliminary hearing was held before Judge ROSENBERG, the respondent herein, a motion by the District Attorney, the appellant herein, to add the charge of criminal trespass in the first degree (Penal Law, § 140.15), another class A misdemeanor, was granted. Thereafter Judge ROSENBERG granted the defendant's motion for a jury trial (57 Misc 2d 536), stating that under *Duncan* v. *Louisiana* (391 U. S. 145, *supra*) it is unnecessary to reach the question of whether or not a possible reformatory sentence pursuant to article 75 renders a crime "serious". Judge ROSENBERG held that the possibility of receiving a maximum one year's imprisonment for the class A misdemeanor was enough in itself to render the crimes charged against the defendant "serious", therefore requiring a jury trial.

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[5] Puryear was arrested and charged with a codefendant. However, the case against that codefendant was subsequently dismissed for reasons unrelated to this proceeding.

By order to show cause, the petitioner-appellant Frank Hogan, as District Attorney of New York County, commenced the instant article 78 proceeding seeking an order prohibiting the enforcement of Judge ROSENBERG'S order and mandating that the trial proceed without a jury. On December 30, 1968 Special Term denied the application and dismissed the petition.

Rejecting the basis of Judge ROSENBERG's decision, Special Term upheld the constitutionality of section 40 to the extent that it prevented jury trials for those persons charged with crimes punishable by imprisonment for not more than one year. The court, however, held that section 40 is unconstitutional to the extent that it denies a jury trial to young adults who face reformatory sentences pursuant to article 75. We do not agree with the latter determination.

Appellant has advanced the argument that the sentencing of a young adult to a reformatory is not punishment at all but rather is purely of a rehabilitative nature and, therefore, should not be considered in determining the petty vs. serious question. It is our opinion that the argument must necessarily fall in light of the Supreme Court's recent decision in *Matter of Gault* (387 U. S. 1), in which Justice FORTAS, speaking for the court, stated:

"Ultimately, however, we confront the reality * * * A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours * * *' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and 'delinquents' confined with him for anything from waywardness to rape and homicide.

"In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'" (*supra*, pp. 27-28).

As we have already indicated in the companion case that a crime must be characterized as serious when the authorized punishment includes a possible term of imprisonment in excess of one year, the possibility of a young adult receiving a reformatory sentence creates an anomalous situation. Under the new Penal Law, an adult convicted of a misdemeanor can in no event receive a sentence greater than one year and, therefore, as to him, under the rationale of the companion case, the crime is petty. A young adult, however, convicted of the same crime may, pursuant to article 75, receive a reformatory sentence of four years and, therefore, as to the young adult the crime is serious.

The impact of this conclusion upon the New York City Criminal Court as well as the act under which it operates may be assessed from two viewpoints. In one sense, we could affirm the determination of Special Term that section 40 of the New York City Criminal Court Act is unconstitutional to the extent that it authorizes the prosecution of a young adult who is subject to article 75 without affording the right to a jury trial. This view would require the State to afford jury trials to all persons between the ages of 16 and 21 charged with any crime including any act for which an adult would be subject to a term of imprisonment greater than 15 days (see Penal Law, § 55.10).

Another, and far more realistic, approach is that the rationale of the companion case and the Supreme Court's decision in *Matter of Gault* (*supra*) deprive the New York City Criminal Court of jurisdiction to impose a reformatory sentence on young adults pursuant to article 75, in the absence of legislation authorizing a jury trial in such cases and providing procedural machinery therefor. This view would not only do the least damage to the legislative goal of speedy and efficient processing of prosecutions for minor offenses, but would also base the availability of jury trials upon the act allegedly committed by the defendant rather than his age; thus elimi-

nating the anomaly of treating a crime as petty, when committed by a person over 21, while the same act committed by a young adult is considered to be serious.

Adopting this latter view, we hold that the Criminal Court has jurisdiction to prosecute and convict any defendant, including a young adult, for any misdemeanor and, upon conviction, to impose any and all of the sentences authorized for the particular crime involved, except as provided by article 75.

We conclude, therefore, that as defendant Puryear is still awaiting trial, and can no longer receive a reformatory sentence, a conviction for the crimes charged will in no event subject him to imprisonment for a term greater than one year, and, therefore, he is not entitled to a trial by jury.

Accordingly, in *People* v. *Baldwin* the judgment appealed from should be affirmed. In *Matter of Hogan* v. *Rosenberg* the judgment of Special Term dismissing the petition should be reversed and the petition granted.

BURKE, J. (dissenting). The majority today concludes that a defendant who is exposed to a maximum of one year's imprisonment is not entitled to the opportunity for trial by jury. Because that conclusion is not supported by a fair reading of the United States Supreme Court's decision in *Duncan* v. *Louisiana* (391 U. S. 145), and because the States have an affirmative obligation to safeguard Federal constitutional rights (*Sims* v. *Georgia*, 385 U. S. 538, 544; *South Carolina* v. *Bailey*, 289 U. S. 412, 420), I must respectfully dissent and indicate, by a complete and objective analysis of the rationale of *Duncan*, that defendants Baldwin and Puryear and all others charged with the commission of class A misdemeanors are entitled to a jury trial because such crimes are "serious" within the meaning of that term as used in *Duncan*. The majority opinion begins by concluding that *Duncan* is not "dispositive" of the present cases. To the extent that *Duncan* did not, in so many words, hold that a one-year maximum sentence requires a jury trial, it is not, to that extent, "dispositive". However, adjudications concerning fundamental constitutional rights cannot be premised upon such a narrowly literal

approach, but must rather employ an analysis based upon the principles which underlie and give meaning to narrow holdings. Thus, in *Duncan*, it is clear that the precise holding was limited to a determination that a crime punishable by a maximum of two years' imprisonment is a serious crime and not a petty offense and that, therefore, due process requires that the defendant charged with such a crime must be accorded the opportunity for a jury trial (391 U. S., p. 161-162). But it is equally clear that that conclusion was but the end result of a process of analysis and the decision is constitutionally significant precisely because its process of analysis provides the basis for subsequent adjudication of cases as to which its precise holding is not "dispositive." The *Duncan* opinion itself recognized this proposition when it pointed out that "the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify these petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance." (391 U. S., p. 160.)

The elements of the analytical process were clearly set forth in *Duncan*, as is clear from the majority's lengthy quotation from the opinion. (opn., pp. 212-213). The court specified that, "In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial," reference should be made to "objective criteria, *chiefly the existing laws and practices in the Nation.*" (391 U. S., p. 161; emphasis added.) The majority, however, prefers for obvious reasons to refer only to the existing and past laws and practices *in this State*, obviously a frame of reference at least a bit narrower than referring to "existing laws and practices in the Nation." [1]

[1] It should be noted that, had this narrower reference been used in the *Duncan* case itself, Louisiana could undoubtedly have shown that its people had demonstrated their view of the pettiness of "simple battery" by their longstanding denial of jury trial for a crime in the Louisiana Constitution, even though such crime carried a maximum penalty of two years' imprisonment.

When reference is had in accord with the *Duncan* standard, it is clear that the existing laws and practices in the Nation indicate that a one-year maximum sentence of imprisonment is sufficient to make a crime "serious" so as to require that a defendant exposed to such a sentence be accorded a right to trial by jury. Congress has expressly rejected a simplistic felony-misdemeanor classification as the determinative factor in distinguishing between "serious" and "petty" offenses:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) *Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.*" (U. S. Code, tit. 18, § 1; emphasis added.) It is, therefore, clear that the existing Federal law recognizes that, although not *all* misdemeanors are "serious" crimes, misdemeanors punishable by imprisonment in excess of six months are beyond the "petty" category. (391 U. S., p. 161.) Existing State laws and practices in the Nation similarly indicate that crimes punishable by up to one year in prison are not considered "petty" for purposes of the right to jury trial. As the opinion in *Duncan* noted, in 49 of the 50 States crimes subject to trial without a jury are punishable by a maximum one-year term and, in fact, "*there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months.*" (391 U. S., p. 161, n. 33.) Indeed, those two instances have since been reduced to one: the denial of trial by jury in *New York City* for crimes punishable by imprisonment for up to one year. The other instance noted by the court in *Duncan* was New Jersey's disorderly conduct offense which, prior to a recent legislative reduction of the maximum sentence to six months (N. J. Stat., Ann., § 2A:169-4, as amd. by N. J. L. 1968, ch. 113), carried a maximum penalty of one year and could be imposed upon conviction without a right to trial by jury. At present, then, the law of 49½ States (New

York City comprising roughly the other half of the State of New York in terms of population) and the Federal law provide a clear-cut answer as to what maximum term of imprisonment indicates the line of demarcation between "petty" and "serious" crimes and the law as to New York City is clearly not in accord with that line of demarcation. Thus, although *Duncan* is not "dispositive" of the present issue in the sense that it did not squarely decide the status of such a one-year maximum, its rationale amply demonstrates that, tested by the *proper* criteria, such a maximum sentence is characteristic of a "serious" crime to the trial of which the right to a jury trial attaches. Should further evidence of that proposition be needed, the internal references in the *Duncan* opinion supply it. At the very point in the opinion at which the court noted that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States" (391 U. S., p. 159), it cited in a footnote (*ibid.*, n. 31) to a series of prior Supreme Court cases dealing with the constitutional right to a trial by jury (*District of Columbia* v. *Clawans*, 300 U. S. 617; *Shick* v. *United States*, 195 U. S. 65; *Natal* v. *Louisiana*, 139 U. S. 621; *Callan* v. *Wilson*, 127 U. S. 540). In none of those cases did the court hold that an offense punishable by a term of imprisonment in excess of six months was a petty offense. In addition, in *Cheff* v. *Schnackenberg* (384 U. S. 373), the court held that an actual sentence of six months' imprisonment for criminal contempt, an offense for which no maximum penalty had been provided, was indicative of a "petty" offense and, therefore, did not require a right to trial by jury. Moreover, in the exercise of its supervisory power over the Federal courts, the court ruled that "sentences *exceeding six months* for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof" (384 U. S., p. 380; emphasis added), thereby expressing its judgment as to the term of imprisonment at which an offense ceases to be petty enough to be tried without a jury trial right. In the face of all those indications

as to the proper resolution of the issue in this case, the majority nevertheless reaches a different conclusion by reference to different criteria.

However, tested even by the criteria chosen by the majority, i.e., the traditional and present practices of the State of New York, the conclusion that a maximum sentence of imprisonment of one year provides the line of demarcation between "serious" and "petty" crimes cannot be sustained. There is no equation in the law of this State between the "felony-misdemeanor" dichotomy and the dichotomy between "serious" and "petty" offenses. The reliance upon this dichotomy alone, after the enactment of the new Penal Law in 1967, necessarily dismisses as without significance the legislative classification of "violations" and the subclassifications of "felonies" and "misdemeanors". Without relying on such additional classifications as determinative, it is sufficient to note that an argument can be made with some force that the Legislature has identified petty offenses as those included in the "violations" category and in the category of class B misdemeanors. Even more interesting is the statement that a felony conviction results in "very serious collateral consequences", while a misdemeanor conviction results in "certain collateral consequences" which "are not of such a nature as to render these crimes serious" (opn., pp. 215, 216). The mere fact that the collateral consequences of a felony are dubbed "very serious" does not, without demonstration, indicate that the collateral consequences of a misdemeanor conviction are not *also* serious. Indeed, the brief of the District Attorney in *Matter of Hogan* v. *Rosenberg* candidly appends a long list of the consequences which may or must flow from a misdemeanor conviction and the great majority of them limit or prevent the convicted misdemeanant's engaging in various occupations. (See, e.g., Insurance Law, § 331; Code Crim. Pro., § 554-b; Education Law, §§ 6514, 7108; Civil Service Law, § 50, subd. 4; Judiciary Law, § 504, subd. 6; § 596, subd. 4; § 662, subd. 4; General Business Law, § 74, subd. 2; Penal Law, § 400.00; Waterfront Commission Compact [L. 1953, ch. 882, § 1, as amd.], art. V, § 3, subd. [b]; § 7, subd. [a]; art. VI, § 3, subd.

[e]; § 6, subd. [a]; art. X, § 3, subd. [b]; § 6, subd. [a]; Waterfront Commission Act [L. 1952, ch. 882, § 2, as amd.], § 5-i, subd. 1; § 5-n, subd. 3, par. [b]; § 8; Administrative Code of City of New York, § B-32-10.0 *et seq.*) While the loss of the right to vote or to hold public office is undoubtedly "very serious," it is somewhat difficult realistically to say that the restriction or prohibition of an individual's ability to find gainful employment is not *also* "serious" (if not also "very serious"). In sum, there has been no such clear-cut distinction drawn in this State between the consequences flowing from convictions for felonies and convictions for misdemeanors as would justify the conclusion that the latter are not "serious" crimes for purposes of a right to a jury trial. If it is true, as the majority suggests (opn., pp. 214-215), that the "maximum penalty authorized in the State of New York for a particular crime is not merely a gauge of how the people of our State view that crime, but necessarily answers the question of whether in their judgment it is petty or serious", it is difficult to understand how that judgment is reflected in statutes (UCCA, § 2011; UDCA, § 2011) providing for the right to a trial by jury, outside New York City, for crimes which the majority has concluded they deem to be only "petty." Have the people of this State, through their elected representatives, decided that class A misdemeanors are "serious" when committed in Syracuse or Rochester but that these same misdemeanors are only "petty" when committed in one of the five boroughs of New York City? Is it reasonable to suppose that the people of this State have made a judgment that lines on a map have some mysterious power to transform the "serious" into the "petty" and vice versa? To say the least, it is to be doubted. Thus, reliance on a so-called public gauge of what is "serious" and what is "petty" leads, in fact, to a conclusion opposite to that reached by the majority since that "public gauge", expressed as it is in reference to the entire State except New York City, indicates that misdemeanors generally (and not just class A misdemeanors) are serious enough to require a jury trial. It should also be noted that the recent Constitutional Con-

vention resulted in a proposed revision of the provision relating to the right to a jury trial which would have accorded that right, after January 1, 1970, to all defendants tried for offenses punishable by a term of imprisonment of *more than six months.* (Proposed Constitution, art. I, § 7, subd. b.) Thus, the most recent expression of the judgment of the people of this State, through their elected delegates, is directly contrary to the judgment attributed to them by the majority. Accordingly, whether tested by the proper national criteria indicated by *Duncan* or tested by the narrower New York criteria preferred by the majority, the conclusion is clear that a defendant charged with the commission of a class A misdemeanor is entitled to a jury trial since the authorized sentence indicates that such a defendant is being tried for a "serious" crime. To the extent that section 40 of the New York City Criminal Court Act denies such a defendant the opportunity for a jury trial, it must be deemed unconstitutional and defendant Baldwin's conviction should be reversed and his case remitted to that court (the same conclusion applies to respondent Puryear in *Matter of Hogan* v. *Rosenberg* since he, too, was charged with the commission of class A misdemeanors).

In the companion case, *Matter of Hogan* v. *Rosenberg*, there is also a different and additional reason why the respondent Puryear is entitled to a jury trial. As a person between the ages of 16 and 21, Puryear was exposed, upon conviction, to treatment as a young adult (Penal Law, art. 75) and was, therefore, exposed to the possible imposition of a four-year reformatory sentence. Such an authorized maximum sentence clearly falls within the "serious" category defined by *Duncan* as mandating a right to jury trial *unless* the characterization of the place of incarceration as a "reformatory" somehow decreases the severity of such a sentence. In determining whether that characterization has such an effect, it is important to recognize certain propositions which indisputably apply to reformatory sentences. First, section 75.00 (subd. 2) of the Penal Law, by its terms, provides for a *sentence* for a *crime* which may be used in place of the ordinary

sentence for that crime. Furthermore, the same section provides that such a sentence shall be of unspecified duration and that the court shall not set either a minimum or a maximum term. Section 75.10 provides that the term of such a sentence begins when the young adult is received by the appropriate institution and terminates either upon discharge by the Parole Board or upon completion of the maximum term.[2] Furthermore, there is nothing in article 75 of the Penal Law to prevent a court from using a reformatory sentence simply to impose a more severe penalty on a young adult defendant even though it may be clear that he is incapable of being benefited by reformatory commitment (cf. Correction Law, former art. 7-A, § 203; *People* v. *Wilson*, 17 N Y 2d 40, 45). In sum, then, article 75 of the Penal Law provides for a true penal sentence of indeterminate duration up to a maximum of four years which is applicable only upon conviction of a young adult for a crime. The District Attorney and the Attorney-General argue, however, that the rehabilitative purposes of a reformatory sentence take it out of the category of criminal sentencing and, therefore, remove it from the coverage of *Duncan*. The argument is unavailing on both constitutional and purely practical grounds especially in view of the unequivocal rejection of such an argument in the juvenile delinquency context of *Matter of Gault* (387 U. S. 1, 27): "It is of no constitutional consequence—and of little practical meaning—that the institution to which he is committed is called an Industrial School [or 'Reformatory']." As the majority notes, the rationale of the *Gault* decision is equally applicable to reformatory sentences in New York and the length of such sentences requires that defendants subject to such sentences be afforded the right to a jury trial, as mandated by *Duncan*. As in *People* v. *Baldwin*, it is section 40 of the New York City Criminal Court Act which presently denies

[2] The possibility of earlier discharge by the Parole Board is insufficient to change the character of the sentence since, under *Duncan*, the maximum *authorized* sentence, and not the sentence actually imposed or served, is the relevant factor in the determination as to whether the defendant is entitled to a jury trial.

such a defendant a jury trial. It, therefore, follows that that section, as the locus of unconstitutionality under *Duncan*, must to that extent be struck down (and that is so in the present case *even if* the one-year maximum sentence for a class A misdemeanor is *not* sufficient to constitute it a "serious" crime for purposes of a right to trial by jury). The majority, however, inexplicably *declares* section 40 unconstitutional, but actually *invalidates article 75 sentences in the New York City Criminal Court.* While it is sound judicial policy to go to great lengths to save a legislative act from constitutionality, it is a questionable implementation of that policy to attempt to save a patently defective bit of legislation by emasculating a different and constitutionally sound legislative act. Article 75 of the Penal Law is a substantive provision which merely provides for a sentence which a court may impose upon a particular class of defendants upon conviction for a crime and which does not in any way purport to deal with the procedural incidents of a trial for criminal acts. No party to these appeals has raised any challenge to the constitutionality of article 75 and the majority states no ground upon which to declare it invalid or unusable in the City of New York, while apparently sustaining its use elsewhere in the State. The remedy for the constitutional infirmity *presently contained in section 40 of the New York City Criminal Court Act* is to excise it by holding that jury trials must be accorded to young adult defendants subject to reformatory sentences. The attempt to remedy it by preventing the use of a device made available by legislative enactment, within the power of the Legislature to enact, is to engage in unwarranted judicial legislation. What the majority holding in effect does is to amend article 75 to say that reformatory sentences may be imposed upon young adults convicted of crimes anywhere in the State *except as to such young adults as happen to be tried for crimes and are convicted in the Criminal Court of the City of New York.* Amendment of legislation is quite clearly a function of the Legislature, the body chosen by and immediately responsible to the people of this State for the exercise of its judgment as to the substantive

penalties to be visited upon persons convicted of crimes. The fact that the Constitution has been construed to require that certain *procedural* rights must be accorded to a defendant subject to the application of a particular *substantive* provision (such as a reformatory sentence) in no way impugns the validity or wisdom of that substantive provision. Thus, the mere fact that *Duncan* and *Gault*, when read together, require that a young adult subject to the imposition of a reformatory sentence be accorded the right to a jury trial in no way affects the validity of the statute authorizing the sentence itself. It simply means that the procedural provision preventing such a trial, in this case section 40 of the Criminal Court Act, is to that extent invalid and must be disregarded. Whether or not, in light of the jury trial requirement here recognized even by the majority, reformatory sentences should continue to be authorized is a matter for the Legislature and courts, lacking as they are the benefits peculiar to the legislative process, cannot properly make such a determination. Accordingly, the order below dismissing the petition for a writ of prohibition to prevent Puryear's trial by jury should be affirmed upon the ground that section 40 of the New York City Criminal Court Act, insofar as it denies him a jury trial, is unconstitutional. Furthermore, it should be pointed out that such a holding in no way limits or prevents the impositon of reformatory sentences in that court, but merely requires that a young adult exposed to such a sentence be accorded a right to trial by jury.

Finally, the majority concludes that the statutory denial of a jury trial for misdemeanants tried in New York City does not violate the equal protection clause of the Fourteenth Amendment even though a jury trial is accorded by statute to defendants charged with identical misdemeanors elsewhere in the State. (*Compare* N. Y. City Crim. Ct. Act, § 40, *with* UCCA, § 2011, and UDCA, § 2011.) With this conclusion I cannot agree even though I recognize that precedent such as *Salsburg* v. *Maryland* (346 U. S. 545 [1954]) would apparently sustain the majority's position. *Salsburg's* holding, however, has been undercut at least somewhat by the subse-

quent decision in *Mapp* v. *Ohio* (367 U. S. 643; see *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649, 658 [1961]) and the decision in *Missouri* v. *Lewis* (101 U. S. 22) is readily distinguishable in that Missouri had provided for appeals (the procedural right at issue in that case) *throughout the State* and had merely provided a different appellate court for appeals from circuit courts in the city of St. Louis and adjoining counties. That decision would be support for the majority's conclusion if Missouri had denied appeals from St. Louis courts while providing for them from courts in all other parts of the State of Missouri. That this was the case is apparent from the *Lewis* opinion itself where the court pointed out that the appellant "Bowman has had the benefit of the right to appeal to the full extent enjoyed by any other member of the profession in other parts of the State." (101 U. S., p. 33.) It is clear here that Baldwin and Puryear have not had and will not have, under the majority's holding, the benefit of a right to jury trial to the full extent enjoyed by any other misdemeanant in other parts of New York State. *Lewis*, therefore, was a case in which there was *no* discrimination and its broad *dicta* as to the constitutionality of territorial discrimination within a State should be regarded as precisely that. As to the current weight of such dicta in cases involving constitutional rights, it should be noted that the court in *Duncan* rather easily rejected the dicta in *Maxwell* v. *Dow* (176 U. S. 581) to the effect that the States could constitutionally abolish jury trials entirely. Furthermore, the viability of territorial discrimination in terms of the equal protection clause is not beyond question in light of its treatment in the recent reapportionment cases (*Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533). With specific reference to equal protection in the context of the criminal law, the Supreme Court has stated that "[b]oth equal protection and due process emphasize the central aim of our judicial system—*all* people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (*Griffin* v. *Illinois*, 351 U. S. 12, 17; emphasis added.)

Similarly, in *Baxstrom* v. *Herold* (383 U. S. 107), that court held that it was a denial of the equal protection of the laws to deny a jury trial on the issue of the mental status of a defendant nearing the end of a criminal sentence when such a jury trial was accorded to all others civilly committed: "It follows that the State, *having made this substantial review proceeding generally available on this issue, may not,* consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." (383 U. S., p. 111; emphasis added.) In the present case, the State of New York, having made jury trials generally available for misdemeanors, cannot, consistent with the equal protection clause of the Fourteenth Amendment, withhold it from some defendants because of the purely fortuitous circumstance that they are tried in New York City rather than in Buffalo, Syracuse or any other locality outside the City of New York. The discrimination which is evident in the present New York scheme "cannot be whistled down the wind with the statement that court business must go on, that dockets must be cleared, or that the requirements of jury service should not be expanded to the loss of the citizen in his private affairs." (*Clawans* v. *District of Columbia*, 84 F. 2d 265, 269, affd. on other grounds 300 U. S. 617.) Accordingly, both Baldwin and Puryear are also entitled to a jury trial since the denial of that right to them constitutes a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. It should also be noted that the majority's holding in preventing the use of reformatory sentences in the Criminal Court of the City of New York, in addition to constituting unwarranted judicial legislation, involves an invidious discrimination against young adults tried in that court in violation of the equal protection clause of the Fourteenth Amendment. In effect, the majority would impose such an invidious discrimination, a discrimination which the Legislature has not made, precisely because the court recognizes that, without such discrimination, such young adults would have jury trials pursuant to the due process clause. It is ironic indeed that a finding that such persons are entitled to one con-

stitutional right results in their being deprived of another and equally valuable constitutional right. The circle thus resulting is both vicious and unnecessary and simply underlines the simplicity and reasonableness of the indicated result, i.e., that such young adults should be accorded the right to a jury trial, at the conclusion of which (assuming a conviction) the discretionary reformatory sentence, as authorized by the Legislature, could be imposed.

Accordingly, in *People* v. *Baldwin* the judgment appealed from should be reversed. In *Matter of Hogan* v. *Rosenberg* the judgment dismissing the petition for a writ of prohibition should be affirmed.

In *Matter of Hogan* v. *Rosenberg*:

Chief Judge FULD and Judges BERGAN, BREITEL and JASEN concur with Judge SCILEPPI; Judge BURKE dissents and votes to affirm in an opinion in which Judge KEATING concurs.

Judgment reversed, without costs, and matter remitted to Special Term for further proceedings in accordance with the opinion herein.

In *People* v. *Baldwin*:

Chief Judge FULD and Judges BERGAN, BREITEL and JASEN concur with Judge SCILEPPI; Judge BURKE dissents and votes to reverse in an opinion in which Judge KEATING concurs.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 1875 Misc., October Term, 1968

ROBERT BALDWIN, APPELLANT

v.

NEW YORK

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 2, 1969

ON CONSIDERATION of the motion for leave to proceed in forma pauperis herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

SUPREME COURT OF THE UNITED STATES

No. 1875 Misc., October Term, 1968

ROBERT BALDWIN, APPELLANT

v.

NEW YORK

APPEAL from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—June 2, 1969

The statement of jurisdiction in this case having been submitted by the Court, probable jurisdiction is noted and the case is transferred to the appellate docket as No. 1472 and placed on the summary calendar.

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